No. 83-1189
In The

Supreme Court of the United States

October Term, 1983

BOARD OF EDUCATION OF THE NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT and "ABBY" and "RICHARD" by their Guardian ad litem, JOHN P. BRACKEN,

Petitioners,

-against-

GORDON M. AMBACH, individually and in his official capacity as Commissioner of Education of the State of New York, and JOSEPH J. BLANEY, individually and in his official capacity as Acting and/or Deputy Commissioner of Education of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY

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PETITIONERS' REPLY

Although the reasons which we believe warrant the grant of a writ are adequately stated in the petition, we believe a brief reply is warranted to correct and comment upon certain assertions contained in the brief in opposition filed by the respondent:

1. THE STANDING OF THE PETITIONER BOARD OF EDUCATION.

The brief in opposition argues (p. 13) that the BOARD OF EDUCATION does not have standing to assert the consitutional rights of the students, ABBY and RICHARD.

First, Respondents ignore this Court's Rule 19(6) which permits any party below to raise any issue litigated before the Court of Appeals. Recently, Justice O'Connor wrote in *Director, etc. v. Perini North River Associates*, _____ *U.S.* _____, *103 S.Ct. 634, at 640,*

> "As party respondent below, the Director is entitled under 28 U.S.C. §1254(1) to petition for a writ of certiorari. Although the Director has statutory authority to seek review in this Court, he may not have Article III standing to argue the merits of Churchill's claim because the Director's presence does not guarantee the existence of a justiciable controversy with respect to the merits of Churchill's coverage under LHWCA. However, the Director's petition makes Churchill an automatic respondent under our Rule 19.6, and in that capacity, Churchill "may seek reversal of the judgment of the Court of Appeals on any ground urged in that court." *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783-84 n, 14, 100 S.Ct. 2467, 2474-2475 n. 14, 65 L.Ed.2d 506 (1980). The director's petition, filed under 28 U.S.C. §1254(1), brings Churchill before this Court, and there is no doubt that Churchill, as the injured employee, has a sufficient interest in this question to give him standing to urge our consideration of the merits of the Second Circuit decision."

Likewise, ABBY and RICHARD are co-petitioners with the BOARD OF EDUCATION, both raising constitutional issues. Certainly, under *Director, etc. v. Perini*, supra, this is sufficient to overcome any Article III standing issue.

Secondly, the very genesis of this proceeding was the order of the respondents to the Board to revoke the students' diplomas. Non-compliance with the order could have resulted in removal from elective office or loss of state financial aid to the Northport District. This, taken with the Board's loco parenti responsibilities to the students is sufficient to meet the requirements of standing under Article III.

2. THE STUDENTS' LEGITIMATE EXPECTATION OF DIPLOMA RECEIPT

Respondents argue, at p. 22 of their Brief, that New York law does not recognize a diploma as an "extension of the educational process." The New York cases cited in support of this assertion all deal with college or university level degrees. (See *Matter of Olsson v. Board of Higher Education*, 49 NY2 408 (1980); *Matter of McIntosh v. Borough of Manhattan Community College*, 78 AD2 839, aff'd 55 NY2 913 (1982); *Levy v. City University of New York*, 88 AD2 915, aff'd 57 NY2 927 (1982).

One New York court has stated, with respect to a local *high-school* diploma,

> "If, by reason of the socio-economic factors of our times an individual may not be deprived of an equal opportunity to obtain whatever education may be provided by a state (see *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98L.Ed 873), then a fortiori one may not be arbitrarily deprived of whatever certificate, diploma, or other evidence of that

> education may be provided. Without detracting from the function of education in satisfying the inherent human characteristic to know, it is also the purpose of secondary education to prepare a student for possible future education and his adult life to the full potential of his capabilities as an individual. Any future employer of infant petitioner, who may require a high school education ... will not accept her affirmation of her educational attainments without a high school diploma as evidence thereof." *Goldwyn v. Allen*, 54 Misc2 94, 281 N.Y.S.2 899, at 903.

Further, respondents ignore the factual determination below that,

> "It appears that Abby was recommended for graduation in 1978 by her school. However after consultation with her parents as required under statute she remained in school ... Absent the request of her parents ... it appears that Abby would have been granted a diploma in 1978 prior to the testing requirement complained of herein." *Board of Education v. Ambach*, 107 Misc2 830. (See Appendix C, page 43 of the Petition.)

Finally, respondents argue at p. 24 of their Brief that ABBY and RICHARD did not complete ... "sixteen units of work at the secondary level." This is patently untrue. Extensive testimony was presented at trial by ABBY and RICHARD'S principals as well as the testimony of expert witnesses (R. 363) that such instruction was given. In fact, agents of Commissioner Ambach described ABBY'S school and curriculum as a "... diploma granting program" (R. 918; A 806). Her final report card evincing passing grades in the 16 secondary units is part of the record below.

ABBY and RICHARD dutifully attended school for many years fully expecting to receive a diploma; this belief was grounded upon a set of rules established by the state of New York. The arbitrary and belated revision of those rules after a successful high school career is patently unconstitutional.

3. THE IMPACT OF COMPETENCY TESTING ON HANDICAPPED PUPILS

Respondents state at p. 15 of their Brief that there is no evidence in the record that handicapped pupils have begun to drop out of school in anticipation of failure of the competency tests and diploma denial. This assertion is untrue. The Assistant Director of an intermediate school district, which educates thousands of handicapped pupils, testified,

"Q. Tell the Court what the impact of the application of the basic competency test has been to the handicapped students in your division.

A. I think that I have to preface it by saying that the handicapped do not, although it would be wonderful to think that people went to school just to learn, it's obvious that getting a degree is of some significance and it's an objective. What we've experienced over the past two years or so is the fact that those students who become aware that they will have severe difficulty or possibly not even pass or even have the opportunity to take these tests tended to become quite discouraged, very resistant to academic activity for whatever purpose and we have a greater number of dropouts in the last two years than we had experienced in years prior to this.

Q. So it's your testimony that handicapped students are dropping out of school as a result of the basic competency tests?

A. That's my belief, yes."

Respectfully submitted,

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